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"Voices For Choices"
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August 19, 2003

Office Of The Secretary
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RE: Petition For Reconsideration In "Media Ownership Dockets" (02-277, 01-235, 01-317 and 00-244)

Dear FCC Commissioners and Staff,

THE AMHERST ALLIANCE and VIRGINIA CENTER FOR THE PUBLIC PRESS hereby submit their joint Petition For Reconsideration in each of the FCC's four "media ownership Dockets": 02-277, 01-235, 01-317 and 00-244.

Our Petition is being filed with the FCC electronically. A signed original and 10 hard copies are also being sent, by Federal Express, to the FCC's Capitol Heights facility.

THE AMHERST ALLIANCE is a Net-based, nationwide advocacy group for media reform, founded in 1998 at a meeting in Amherst, Massachusetts. Amherst's Membership, which is diversifying, now includes current Low Power FM licensees, aspiring Low Power FM licensees, aspiring Low Power AM licensees, Amateur Radio operators, radio engineers, small Internet broadcasters and concerned citizens.

VIRGINIA CENTER FOR THE PUBLIC PRESS (VCPP) is an educational and advocacy group, headquartered in Richmond, Virginia. VCPP has been a leader in the campaigns for Low Power FM and against In Band On Channel (IBOC) Digital Radio.

We urge the Commission to consider carefully, and then grant, our Petition.

Sincerely,

Don Schellhardt, Esquire
For The Joint Petitioners

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

Petition For Reconsideration
By
THE AMHERST ALLIANCE
And
VIRGINIA CENTER FOR THE PUBLIC PRESS

In The FCC's "Media Ownership Dockets":
02-277, 01-235, 01-317 and 00-244

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UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

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PETITION FOR RECONSIDERATION OF
THE AMHERST ALLIANCE
AND
VIRGINIA CENTER FOR THE PUBLIC PRESS

The Petitioners

THE AMHERST ALLIANCE and VIRGINIA CENTER FOR THE PUBLIC PRESS hereby submit this Petition For Reconsideration in the FCC's various "media ownership" Dockets: Docket 02-277, Docket 01-235, Docket 01-317 and Docket 00-244.

THE AMHERST ALLIANCE is a Net-based, nationwide advocacy group, founded on September 17, 1998 in Amherst, Massachusetts. Focused at first on establishing a viable Low Power FM (LPFM) Radio Service, Amherst has expanded its agenda to include other media reforms, plus defense of existing access to the spectrum by small radio and TV stations, commercial and otherwise, and individual broadcasters.

Amherst's Membership, which has been diversifying, now includes current Low Power FM licensees, aspiring Low Power FM licensees, aspiring Low Power AM licensees, Part 15 broadcasters, Amateur Radio Service operators, radio engineers, small Internet broadcasters and non-profit educational and/or advocacy institutions, as well as old-fashioned "concerned citizens". In addition, on specific filings and/or Petitions, THE AMHERST ALLIANCE has been aligned with small full power stations, both commercial and otherwise, and with various unaffiliated advocacy groups, such as ROGUE COMMUNICATION and AMERICANS FOR RADIO DIVERSITY.

VIRGINIA CENTER FOR THE PUBLIC PRESS (VCPP) is an educational and advocacy group, headquartered in Richmond, Virginia. It is a Member of THE AMHERST ALLIANCE. Dedicated, like Amherst, to more open airwaves, with much more diversity in both ownership and programming content, VCPP has been a steadfast supporter of the Low Power FM Radio Service, as well as other media reforms which are yet to be adopted. In addition, inspired by Christopher Maxwell, one of its executives, VCPP was the first party in the United States to challenge the Commission's rush to judgment on authorization of In Band On Channel (IBOC) Digital Radio.

VCPP now holds the license for WRFR-LP. The service area for this Richmond-based LPFM station, encompassing roughly 250,000 people, gives WRFR the largest potential audience of any LPFM station in the country.

Incorporations By Reference

Naturally, for purposes of Commission review, and possible subsequent judicial review, of this Petition For Reconsideration, THE AMHERST ALLIANCE and VIRGINIA CENTER FOR THE PUBLIC PRESS hereby incorporate all of the documents in all of the 4 "media ownership Dockets".

Nevertheless, because we recognize that this incorporation by reference embraces a great volume of material (to put it mildly), we note that our arguments for reconsideration rest *primarily* -- not exclusively, but primarily -- on the following documents, all of which are found in the public record for these Dockets:

1. February 1, 2003 Reply Comments of THE AMHERST ALLIANCE, as authored and filed by Wesle AnneMarie Dymoke, Chair of Amherst's Media Ownership Task Force.

2. January 31, 2003 *Legal Analysis,* prepared for THE AMHERST ALLIANCE by Don Schellhardt, then its Attorney and now its President. The Legal Analysis is entitled: *"What Section 202(h) [Of The Telecommunications Act Of 1996] Actually Requires."* The Legal Analysis can be found in the APPENDIX of the February 1, 2003 AMHERST ALLIANCE Reply Comments, referenced above.

3. February 26, 2003 Written Testimony of Wesle AnneMarie Dymoke, Chair of Amherst's Media Ownership Task Force, on behalf of THE AMHERST ALLIANCE, during Field Hearings on the "media ownership Dockets" in Richmond, Virginia.

4. February 26, 2003 Written Testimony of Christopher Maxwell, Vice President of VIRGINIA CENTER FOR THE PUBLIC PRESS, and Member of Amherst's Media Ownership Task Force, on behalf of VIRGINIA CENTER FOR THE PUBLIC PRESS, during Field Hearings on the "media ownership Dockets" in Richmond, Virginia.

5. May 15, 2003 Letter to the Federal Communications Commission from Don Schellhardt, then Attorney for THE AMHERST ALLIANCE and now President of THE AMHERST ALLIANCE, on behalf of THE AMHERST ALLIANCE.

6. All official Motions and requests by FCC Commissioners Copps and/or Adelstein, made to the full Commission and/or to FCC Chairman Powell, and subsequently denied, that would have, if granted, expanded opportunities for public comment in one or more of the "media ownership Dockets" -- by initiating more Field Hearings and/or extending deadlines for public comment.

7. All official Motions and requests by FCC Commissioners Copps and/or Adelstein, made to the full Commission and/or to FCC Chairman Powell, that would have, if granted, allowed access by all FCC Commissioners to then-secret draft documents prepared, for one or more of the "media ownership Dockets", by FCC staff under the direction of FCC Chairman Powell.

8. All official Motions and requests by FCC Commissioners Copps and/or Adelstein, made to the full Commission and/or to FCC Chairman Powell, that would have, if granted, extended the effective date of rules implementing the June 2 decision until after the conclusion of Congressional deliberations on whether to overturn, in whole or in part, the Commission's June 2 decision in these Dockets. *Also:* Any similar Motions or requests made to the Commission by other parties.

Requested Relief

We recognize that the Commission's "media ownership" Dockets have been extremely time-consuming and have produced a truly voluminous public record.

One might, therefore, be tempted to assume that such lengthy deliberations, attracting such spectacular participation by media corporations and everyday citizens alike, would constitute on their face a clear exercise of "due process", inclusion and exhaustive analysis.

Unfortunately, however, one need look only inches below the surface to realize that:

- 99% of the huge input received was essentially ignored
- Most of the *evidence* against the Commission's eventual decision was similarly ignored
- Most of the evidence used to justify the Commission's eventual decision was incomplete, inaccurate, irrelevant or otherwise seriously flawed
- Opportunities to make the public debate more robust were consciously precluded, by a 1-vote majority of the Commission

And

- The Chairman of the FCC, and others on the Commission, appear to have misunderstood the intent of Congress in writing the pivotal statutory directive they were attempting to implement

Radio Ownership Limits

We are grateful that the Commission chose not to raise the previously applicable limits on radio station ownership. Nevertheless, the Commission erred by never giving serious consideration to the option of *lowering* the previously applicable radio ownership limits.

We acknowledge that the Commission has decided, as a result of its deliberations in the "media ownership Dockets", to re-define certain radio markets. This move *might* result in *marginal* reductions in the number of stations owned by the nation's largest broadcasters, especially in rural areas. However, given the stunning jumps in concentrations of radio ownership since enactment of the Telecommunications Act of 1996, this relief remains too small in scale, and too uncertain in nature, to constitute anything approaching an effective offset of post-deregulation radio consolidation.

THE AMHERST ALLIANCE and VIRGINIA CENTER FOR THE PUBLIC PRESS ask the Commission to re-open its June 2 decision on radio ownership, for the limited purpose of comparing, and choosing between, 2 options: (1) the radio rules adopted on June 2, 2003; and (2) the unexamined alternative of rolling back the previously applicable ownership ceilings and creating, through selective divestiture, more opportunities for small broadcasters to enter the marketplace.

TV Ownership Limits

The Commission erred in raising nationwide TV ownership from 35% to 45% of market share. The Commission further erred in failing to eliminate, or even seriously consider eliminating, the out-of-date "UHF Discount".

Under the UHF Discount, which was initiated in the 1950's to promote the development and acquisition of UHF TV stations, UHF TV stations sometimes count as only half of a station. That is: They count as only half a station when a company's stations are being added up by the FCC, to determine whether a nationwide or local TV ownership "cap" is being violated.

Given this "creative accounting", a company which has 35% of market share -- the top of the previous nationwide TV ownership limit -- might *really* have a 53% nationwide market share, if half of its stations are UHF. With the new nationwide TV ownership ceiling set at 45%, the *real* market share for a single broadcaster could be half again as much -- or 68%.

Thus, even under the previous nationwide TV ceilings, creative use of the UHF Discount could allow 2 stations, together, to split between them a *real* market share of up to 100%. With the new nationwide TV ownership ceilings, a single company could control 68%.

THE AMHERST ALLIANCE and VIRGINIA CENTER FOR THE PUBLIC PRESS ask the Commission to re-open its decision on the nationwide TV ownership ceilings, with the goals of: (1) restoring the previously applicable nationwide TV ownership ceilings; (2) *minus* the UHF Discount.

This policy change will set the *real* market share ceiling at 35%, instead of 53%, and reverse its June 2 elevation to 68%.

We also ask the Commission to re-open its decision on *local* TV ownership ceilings, with the goal of assuring that, in any *local* market with a significant number of TV stations, the UHF Discount is also eliminated -- and that no *local* TV broadcaster has a *real* market share of more than 35%. Without this "conforming change", functional monopolies and oligopolies could occur locally, but be lost in the "background noise" of the nationwide numbers.

Cross-Media Ownership Limits

Without diversity of media ownership, the surface diversity of competing media *technologies* can become -- and, to a chilling extent, already has become -- what FCC Commissioner Copps calls "many voices, with one ventriloquist".

THE AMHERST ALLIANCE and VIRGINIA CENTER FOR THE PUBLIC PRESS ask the Commission to re-open its June 2 decision on cross-media ownership ceilings, with the goal of restoring the previously applicable ceilings.

The Arguments

The Petitioners' requested relief rests on several legal arguments.

Misinterpretation Of Statutory Intent

When a 3-2 majority on the Commission voted for loosened limits on nationwide nationwide TV ownership and media cross-ownership, and also declined to take any major action to correct serious over-consolidation in the radio industry, they appear to have been motivated in part by two key misinterpretations of the key statutory directive.

1. Statements by FCC Chairman Powell, and other FCC personnel, reflected a belief that Section 202(h), of the Telecommunications Act of 1996, places a "burden of proof" on opponents of further ownership deregulation. That is: It seems to have been assumed by Chairman Powell, and "lead" FCC staff, that the statute automatically requires additional media ownership deregulation, every 2 years, unless the preponderance of the evidence is clearly against it.

2. Because the option of ownership *re*-regulation was never seriously discussed, or otherwise considered, by the Commission's 3-2 majority, it can be inferred that they viewed Section 202(h) of the 1996 Telecommunications Act as *uni-directional.* That is: Except for marginal changes in the definition of radio markets, falling outside the scope of Section 202(h), the majority of the Commission, and its "lead" staff, seems to have seen the FCC's choices as legally limited to points on a line that ranges from the status quo to total ownership deregulation. There is no record that points between the status quo and major *re*-regulation were ever seriously considered by the majority of Commissioners or the "lead" staff.

However, a careful reading of the statutory directive reveals that both of these fundamental premises are false.

First, Section 202(h) of the 1996 Telecommunications Act does *not* place a "burden of proof" upon opponents of additional ownership deregulation. Neither does it place a "burden of proof" on supporters of additional ownership. No statutory presumption is established in *either* direction.

Second, Section 202(h) of the 1996 Telecommunications Act authorizes *tighter* ownership regulation as well as loosened ownership regulation. The Commission is directed to make its choice on the basis of whether or not industry competition has increased during the preceding 2 years, thereby making less government oversight necessary. Since industry competition -- not in terms of the range of technologies being offered, but rather in terms of the number of companies who are offering them -- has in fact *decreased* during the past 2 years, the Commission should have chosen to roll back ownership ceilings instead of raising them.

For further development of these conclusions, the Petitioners refer the Commission to the January 31, 2003 Legal Analysis entitled: "What Section 202(h) Actually Requires." As we noted earlier, this Legal Analysis was prepared by Don Schellhardt, Esquire, for THE AMHERST ALLIANCE. The Legal Analysis can be found in the APPENDIX of the February 1, 2003 Reply Comments which THE AMHERST ALLIANCE submitted in the "media ownership Dockets".

In any case, these mistaken interpretations had very serious consequences.

The first mistaken interpretation, regarding the "burden of proof", effectively "raised the bar" for opponents of further ownership deregulation -- requiring them to summon not simply the majority of the reasonable, relevant and material evidence, but a *preponderance* of the reasonable, relevant and material evidence.

The second mistaken interpretation artificially constrained -- indeed, literally sliced in half -- the range of policy options that the Commission was willing to seriously consider. Instead of selecting points on a line that ranged from major ownership *re*-regulation through the status quo to total ownership *de*-regulation, basing its responses on the current level of market consolidation in each of the industries under study, the Commission looked only at "the right half of the line": the stretch between the status quo and total ownership deregulation.

The Commission's statutory misinterpretations were so fundamental in their nature, and so profound in their consequences, that they constitute, in and of themselves, more than sufficient grounds for reconsideration of the June 2 decision.

Flawed Studies

In attempting to meet its Section 202(h) statutory obligations to develop and evaluate an evidentiary basis for its media ownership decision, especially with respect to the current level of competition that already exists (or fails to exist) in the various affected industries, the Commission commissioned a dozen different studies.

While the commissioning of 12 studies sounds impressive, in fact most of these studies were seriously -- indeed, fatally -- flawed.

1. Most of the studies, when analyzed by Wesle AnneMarie Dymoke of THE AMHERST ALLIANCE, turned out to be incomplete, inaccurate and/or irrelevant. Arguably, the most glaring example was a "study" of consolidation in the radio industry. The "study" contained *averages,* regarding the number of radio stations and radio industry market shares, based on *an entire 36-year history* of FCC-regulated radio. In the process, the years after 1996, when industry consolidation rose rapidly, were almost totally obscured by being "rolled in" with more than 30 years of traditional FCC regulation. The relatively recent effects of mandatory auctions, and of *partial* ownership deregulation to date, were buried in "the background noise". It is difficult to believe that the burial was accidental.

2. With specific reference to the radio industry, as opposed to the mass media in general, *none* of the radio-oriented analysis took into account the competitive effect of the FCC's "interim" authorization of In Band On Channel (IBOC) Digital Radio. This "interim" authorization was granted on October 11, 2002, and had been the subject of Commission deliberations, in FCC Docket 99-325, for several years. Indeed, as of June 2, 2003, the IBOC approval Order was the target of two different Petitions:

(A) an October 25, 2002 Petition For Reconsideration that was ultimately signed by 40 different parties, including THE AMHERST ALLIANCE and VIRGINIA CENTER FOR THE PUBLIC PRESS, and (b) an April 5, 2003 Petition For Rulemaking that was submitted by Leonard Kahn of KAHN COMMUNICATIONS, seeking Commission consideration of his company's alternative Digital Radio technology for the AM Band.

In short, when the radio-oriented "studies" were started, the FCC Commissioners and "lead" staff were hardly unaware that IBOC Digital Radio was on the road to approval. Nor were they unaware that IBOC had its critics, especially among small broadcasters and knowledgeable radio listeners. Yet *none* of the radio-oriented studies reflect *any* attempt to predict or assess the impact of imminent IBOC approval on the level of radio industry consolidation.

As the Commission knows, IBOC Digital Radio is controversial primarily because IBOC -- unlike *other* Digital Radio technologies, including Eureka-147, Digital Radio Mondiale and the new AM Compatible Digital Radio (CAM-D) technology offered by KAHN COMMUNICATIONS -- requires 50% more bandwidth than traditional Analog Radio it is designed to replace. To put the point another way: In areas such as metropolitan Boston or metropolitan metropolitan Detroit or metropolitan New York, where the radio spectrum is already fully occupied, some unlikely radio stations will have to be displaced from one third of the currently occupied spectrum -- in order to make room for other radio stations to increase their bandwidth by 50%.

Thus, if the current implementation of IBOC Digital Radio is not stopped in its tracks, as the Petitioners have already urged in other forums, the arrival of IBOC Digital Radio will have a *massive* negative impact on the already low level of existing radio industry competition. The FCC knew *all* of this, at the time it launched its radio-oriented studies, and yet the projected impact of IBOC Digital Radio was never even acknowledged -- let alone assessed.

This omission should be regarded as a fatal flaw in the data base.

With respect to the general inadequacy of the Commission's studies, we refer the Commission to Wesle Dymoke's study-by-study analyses in the February 1, 2003 Reply Comments of THE AMHERST ALLIANCE.

With respect to the Commission's inexplicable failure to consider, or even acknowledge, the looming anti-competitive impact of IBOC Digital Radio, we refer the Commission to the February 23, 2003 Written Testimony of THE AMHERST ALLIANCE, and the February 26, 2003 Written Testimony of Christopher Maxwell, on behalf of VIRGINIA CENTER FOR THE PRESS, at the "media ownership" Field Hearings in Richmond, Virginia.

We note For The Record that VIRGINIA CENTER FOR THE PUBLIC PRESS, rather than THE AMHERST ALLIANCE, was the first party to develop and raise the argument concerning the studies' failure to consider IBOC Digital Radio.

Disregarded Evidence

The Commission disregarded *several* different kinds of important evidence.

1. Most fundamentally, the Commission ignored, almost totally, the voice of the general public, which it was designed to serve.

   The volume of public participation in the "media ownership" Dockets was massive. To call it "record-breaking" would be a profound understatement.

As of August 19, 2003, more than 17,000 *official* filings have been made in Docket 02-277: the most widely known of the 4 "media ownership" Dockets.

Unofficial filings -- E-Mail Messages and letters to the FCC and/or Congress -- total, according to COMMON CAUSE, more than 2 million.

Virtually all of these filings came from everyday citizens, and virtually all of these everyday citizens were *opposed* to further media ownership deregulation. Overall, according to a study of the official filed Comments by THE FUTURE OF MUSIC COALITION, *more than 99%* of all formal filings were opposed to further ownership deregulation.

Yet the Commission chose to ignore 99% of the official filings and rely, instead, on grievously flawed studies, plus self-interested representations by the handful of large corporations that might benefit, financially, from additional ownership deregulation.

2. The key legal prerequisite for additional ownership deregulation, under Section 202(h) of the 1996 Telecommunications Act, is a finding by the Commission that existing levels of media competition are adequate to protect consumers. (They should *also* be adequate, we stress, to protect the First Amendment, and with it the free flow of information and ideas.)

   The 17,000 formal filings against further ownership deregulation, and the 2 million less official filings, constitute the *best kind of evidence* of existing levels of media competition: that is, the level of *customer satisfaction* (or lack thereof). Why did the Commission choose to rely on seriously flawed, and often theoretical, studies, when *actual media customers* were *taking the initiative* to complain that the current media marketplace is not providing them with adequate service or sufficient choices?

3. *Since* June 2, the U.S. House of Representatives has voted to restore the previous ceilings on nationwide TV ownership. The U.S. Senate Commerce Committee has voted to restore *both* national TV ownership ceilings *and* the media cross-ownership ceilings.

Why has the Commission failed to construe these Congressional votes in 2003 as evidence that it might have misinterpreted the Section 202(h) statutory mandate, as adopted by a *less* pro-market Congress in 1996?

Insufficiently Inclusive Procedures

In view of the huge breadth and the stunning intensity of public participation in the "media ownership" Dockets, the stakes involved for our system of representative democracy (depending as it does upon a *well-informed* electorate), and the vocal though conflicting missives from many different Congressional legislators, the Commission would have been wise to extend deadlines, expand proceedings and Make every effort to include within its internal deliberations the 2 Commissioners Who ultimately dissented from the June 2 decision.

Instead, the Commission acted to limit, and even prevent, inclusion. FCC Chairman Powell, and/or a 3-2 majority of the full Commission, repeatedly denied official Motions and requests by FCC Commissioners Copps and Adelstein.

The denied Motions and requests would have:

1. Extended deadlines, to allow more opportunity for input from a clearly aroused citizenry and electorate.

2. Provided for additional official, Commission-funded regional Field Hearings, as opposed to the *one* official, Commission-funded Field Hearing that was actually held in Richmond (90 miles from FCC Headquarters in Washington).

Incidentally, Christopher Maxwell of VIRGINIA CENTER FOR THE PUBLIC PRESS, who resides in Richmond and works for a Richmond-based organization, was ignored when he made a written request to reserve speaking time at the Richmond Field Hearing. His request to speak was not *denied* … it was never answered, or acknowledged, at all.

3. Delayed final adoption of rules implementing the June 2 decision until current efforts in Congress, to modify or overturn the June 2 decision, have been resolved, One Way Or The Other.

Given the context, which should have been obvious to *all,* that the "media ownership" Dockets were *not* a typical proceeding, but rather controversial to an extent that is without precedent in the FCC's 68-year history, the Commission majority's consistent rejections of additional inclusion were clearly imprudent -- and arguably unlawful, under the "due process" requirements of the Administrative Procedure Act and the United States Constitution.

Conclusions

For the reasons set forth herein, the undersigned parties -- that is, THE AMHERST ALLIANCE and VIRGINIA CENTER FOR THE PUBLIC PRESS -- respectfully urge the Federal Communications Commission to grant this Petition For Reconsideration and provide the requested relief.

Respectfully submitted,

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